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The Capital Punishment Controversy in Hungary: Fragments on the Issues of Deterrent Effect and Wrongful Convictions

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Although the death penalty has been abolished in the majority of the European countries by now (it is only applied in Belarus, while Russia can be considered a so-called *de facto* abolitionist state, where this sanction exists in theory, but no execution has taken place in the last fifteen years and, according to the current situation, will not take place anymore), the debates concerning capital punishment keep arising. In many European countries leading politicians argue or have recently argued in favour of reinstatement of the death penalty and not only the leaders of extremist parties (such as Ján Slota, former president of the Slovakian SNS,¹ in 2010, or Jean-Marie Le Pen, former president of the French FN² and his daughter Marine Le Pen, former vice-president, currently president of the party, in 2007), but moderate (mainly conservative) politicians as well. Similarly, Lech Kaczyński, Poland's deceased president, advocated an European debate regarding the reintroduction of capital punishment in 2006; his twin brother, Jarosław Kaczyński, former prime minister and currently president of the leading opposition party, the PiS,³ announced at the end of 2011 that one of the objectives of his party was also to reinstate the death penalty. Daniel Lipšic, former Slovakian

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¹ *Slovenská národná strana* (Slovak National Party).

² *Front National* (National Front).

³ *Prawo i Sprawiedliwość* (Law and Justice).

Minister of Justice, also raised the issue at the beginning of 2008 and John Arthur Stevens, former head of the Metropolitan Police Service (better known as Scotland Yard) in England, also declared after the murder of a policewoman in 2005, that although he was against capital punishment before, the only acceptable response to brutal murders is death. All these persons were in favour of the death penalty, partly for moral reasons and partly for practical considerations believing that capital punishment has a deterrent effect and would serve to actually decrease the number of murders.

The debate related to capital punishment keeps arising in Hungary as well, especially after brutal murders. Various politicians stated that, according to their personal opinion, the reinstatement of the death penalty would be expedient or proper, or that it should not have been abolished in the first place. For example, Hungary's current prime minister, Viktor Orbán, spoke in a radio interview back in May 2002, when he first served as prime minister (between 1998–2002), still in his capacity as PM, that after having met the relatives of the murdered victims of the recent Mor bank robbery his opinion regarding the death penalty had changed, and while he had been against it before, now he would be in favour thereof. He also declared that he is aware that Hungary would not be able to join the European Union⁴ if it would maintain or reinstall the death penalty, but he believed the EU was changing as well and there may come a time when the EU — for instance, in the fight against terrorism — will once again permit this kind of sanction. According to Mr. Orbán, Hungary should be amongst those countries in Europe which argue that the death penalty should once again fall within the scope of national legislation.

The last time when a hot debate on capital punishment started in Hungary was in 2012: first in July 2012, when a young, pretty police psychologist was raped and murdered in Pécs, and then in the late autumn of 2012, when the body of an 11-year-old boy was found, a few days after he went missing on 30 October 2012, and it was established that the boy was murdered with premeditation (it is suspected that his foster-mother had him beaten to death by two homeless men). Following these cases not only common people started demanding the reintroduction of capital punishment (e.g., tens of thousands of people on Facebook), but many celebrities expressed their opinion as well, and numerous politicians also openly criticised the present regulation which does not allow the imposition of the death penalty and the execution of brutal murderers. The loudest, of course, was the extreme right-wing party, the JOBBIK, which includes the reinstatement of capital punishment in its official programme since its foundation and which received 17% of the votes in the parliamentary elections of 2010; the true novelty,

⁴ Hungary was not yet a member of the EU in 2002, it joined the European Union on 1 May 2004.

however, was that a number of politicians of the currently governing parties also openly supported the revival of executions in practice. As such, a smaller group within FIDESZ, the larger governing party, composed of members of the former Independent Smallholders, Agrarian Workers and Civic Party who switched to FIDESZ, declared that in the parliament they would be proposing the modification of the Criminal Code such as to actually allow capital punishment in the future (such a bill was not presented to the parliament, in the end); furthermore, several Members of Parliament of the smaller governing party, the KDNP,⁵ made statements supporting the reintroduction of the death penalty. Their reasons were the same as those of the European supporters, namely that the application of the death penalty would be necessary since it would deter some of the potential murderers from committing their crime; on the other hand, the argument that “society should not support murderers” lately appears regularly in the public opinion (and even in articles of certain newspapers), that is — they believe —, that the death penalty is cheaper than life imprisonment, which is another reason supporting the need for its reinstatement. Considering that these arguments not only appear from time to time, but the social pressure to reintroduce the death penalty has expressly grown in the past years (at least in Hungary), a growing number of the professional politicians would now be willing to give in to this pressure if it was not outlawed by international treaties (especially the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols No. 6 and 13, and the International Covenant on Civil and Political Rights and the Second Optional Protocol thereto) and the European Union. As such, it is not out of place to consider the arguments regarding the death penalty and investigate their validity, primarily in light of the Hungarian data and trends.

As to the controversy over capital punishment, two fundamental types of dispute — along with the two kinds of reasoning supporting them — that centre on the appropriateness or applicability of the death penalty can be differentiated. There exist, on the one hand, philosophical or moral, and, on the other hand, pragmatic (empirical and logical) reasons. Pragmatic arguments are characterised by impartiality and objectivity resting on solid, empirical, and at least partly supervisable grounds. As opposed to this, moral arguments are not formed on the basis of such requirements; therefore, they cannot be regarded as par excellence rational arguments by nature. Ethical viewpoints rest on profound beliefs that one accepts as axioms, in other words, one has a particular opinion of something without backing it up logically either by means of listing supporting evidence or refuting its counterarguments. The essence of morality lies in its status as the innermost, unquestionable and indisputable, hence, undeniable (that is, immune

⁵) *Kereszténydemokrata Néppárt* (Christian Democratic People's Party).

to refute) part of the human psyche which is best described by the word “belief”;⁶ and nothing can dissuade those who “believe” from their own presuppositions and convictions.⁷ Hence, if someone “believes” that the ultimate moral principle is to rid society of the “evil”, that is, of those people who are dangerous and purposefully trespass, posing a threat to their fellow, law-abiding citizens, and that the only proper way to do that is for such a trespasser to receive punishment in the same form as they have offended because there is no treatment more just than that, then this person will claim with a solid moral conviction that the death penalty is an appropriate form of punishment. At the same time, those of the opposite viewpoint who think that no human has the right to make judgments over other humans and that life is so sacred and invaluable, so that it is forbidden to take it away in an “ethical” society, even from those people who deliberately took away others’ life out of their own immorality, will emphasise the legitimacy of their own beliefs with the same vehemence. The debate between everyday people — and also between professionals with their points elaborated in a more sophisticated argumentation — on capital punishment rests on such moral grounds, which results in the mutual, conscious ignorance of the other party’s reasoning and a shift from the point under discussion to personal disagreements, rendering the studies dealing with the death penalty as weapons of a philosophical jihad rather than inferences based on rational research. Since moral arguments as enunciations of beliefs cannot be studied rationally, that is, — to put it more simply — they do not meet scientific criteria,⁸ I will not discuss the pure forms of the arguments raised in connection with the death penalty⁹ in this paper.

However, the empirical points of discussion concerning the death penalty also enable to extremely polarise the various standpoints of people. This is equally true for the issue of the deterrent effect, the possibility of wrongful convictions, the

⁶ The word “belief” is not used to mean or refer to faith here, it stands as a synonym for any aprioristic point of view.

⁷ As a result, moral conviction as belief is irrational, which simply means that, as far as its genesis is concerned, it is not a consequence of something but it depends on an aprioristic choice of values (that is, there is no rational reason or logical verification behind it).

⁸ The scientific criterion — in contradiction with its older conception — is not verifiability, but, instead, falsifiability. It follows from this that an assertion cannot be regarded as a scientific statement if it does not — not even in theory — leave any room for proving (unavoidably only temporarily, owing to the current perception of what is scientific) its falseness (in the presence of appropriate conditions). Therefore, moral arguments do not constitute any part of science (just like any other declaration or conviction formed on beliefs).

⁹ Clearly, many rational arguments build on a more or less moral base. Nevertheless, this does not necessarily entail that these are “moral” arguments, so it should come as no surprise if moral elements do occur in some or even in most of the upcoming examples that are to be analysed without one having the obligation to call their rational/empirical nature into question because of this.

matter of humanity or inhumanity of the individual methods of execution applied nowadays,¹⁰ the existing or non-existing discrimination in the judicial process¹¹ or even for the financial aspects.¹²

The practical arguments concerning the applicability or non-applicability of capital punishment need to be divided into two distinct categories: relevant and non-relevant arguments. While the former, either in themselves or through their relationship with one another, may be used to prove the standpoint of retention or that of abolition, the latter — regardless of what the truth is about them — cannot even in theory serve as a rationale for taking a position in the discussion of

¹⁰ As for this issue, see, e.g.: from the abolitionist side: M.J. Borg and M.L. Radelet, 'On botched executions', in P. Hodgkinson and W.A. Schabas (eds), *Capital Punishment. Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), pp. 143–168; from the retentionist side: D.O. Friedrichs, 'Humanism and the death penalty: an alternative perspective', 6 *Justice Quarterly* (1989), 197–209.

¹¹ On the matter of discrimination, see, e.g.: M.E. Wolfgang, and M. Riedel, 'Racial Discrimination, Rape and the Death Penalty', in H.A. Bedau (ed.), *The Death Penalty in America* (Oxford: Oxford University Press,), pp. 194–205; P. Hodgkinson, 'Capital punishment: improve it or remove it?', in Hodgkinson and Schabas, *Capital Punishment. Strategies for Abolition*, pp. 1–35; R.J. Tabak and J.M. Lane, 'The execution of injustice: a cost and lack-of-benefit analysis of the death penalty', 23 *Loyola of Los Angeles Law Review* (1989), 59–146; W.S. White, *The death penalty in the nineties: an examination of the modern system of capital punishment* (Ann Arbor, MI: The University of Michigan Press, 1991), pp. 135–163; R. Paternoster, *Capital Punishment in America* (New York, NY: Lexington Books, 1991), pp. 115–160; W.J. Bowers and G.L. Pierce, 'Racial discrimination and criminal homicide under post-Furman capital statutes', in Bedau, *The Death Penalty in America*, pp. 206–224; W.O. Hochkammer Jr., 'The capital punishment controversy', in J.A. McCafferty (ed.), *Capital Punishment* (Chicago, IL: Aldine-Atherton, 1972), pp. 65–87; H. Schwarzschild, In Opposition to Death Penalty Legislation, in Bedau, *The Death Penalty in America*, pp. 364–370; S.L. Gross, 'Race and death: the judicial evaluation of evidence of discrimination in capital sentencing', 18 *University of California Davis Law Review* (1984–1985), 1275–1325; B. Stevenson, 'Close to death: reflections on race and capital punishment in America', in H.A. Bedau and P.G. Cassell (eds.), *Debating the Death Penalty* (Oxford: Oxford University Press, 2004), pp. 76–116; C.J. Ogletree, 'Black man's burden: race and the death penalty in America', 81 *Oregon Law Review* (2002), 15–38; S.B. Bright, 'Discrimination, death and denial: the tolerance of racial discrimination in infliction of the death penalty', 35 *Santa Clara Law Review* (1994–1995), 433–483; W.J. Bowers, 'The pervasiveness of arbitrariness and discrimination under Post-Furman capital statutes', 74 *Journal of Criminal Law and Criminology* (1983), 1067–1100. For the simple inherent capriciousness of the death penalty, see: R.A. Berk, R. Weiss and J. Boger, 'Chance and the death penalty', 27 *Law and Society Review* (1993), 89–110.

¹² It should be shocking, at least at first glance, that, according to every survey, the existence of capital punishment in a given legal system induces more expenditure than if this legal institution did not exist at all. For the real costs of the death penalty, see, e.g.: Paternoster, *op. cit.*, pp. 187–216; R.L. Spangenberg and E.R. Walsh, 'Capital punishment or life imprisonment: some cost considerations', 23 *Loyola of Los Angeles Law Review* (1989–1990), 45–58; R.C. Dieter, 'Millions misspent: what politicians don't say about the high costs of the death penalty', available online at: <http://www.deathpenaltyinfo.org/article.php?scid=45&did=385>; Tabak and Lane, *op. cit.*, pp. 133–138; M. Garey, 'The cost of taking a life: dollars and sense of the death penalty', 18 *University of California Davis Law Review* (1984–1985), 1221–1273.

the death penalty's acceptability. This latter category includes (among many other reasons of secondary importance) arguments pertaining to *par excellence* economic (i.e., pecuniary) aspects or arguments in connection with the public's support, and since these attributes are by nature defined or influenced by a particular legal system, one can only make inferences about the state of the actual legal system in question but not about capital punishment as such. It follows from this that the arguments dealing with these issues are only valid as long as the circumstances in which they arose persist, and, as soon as a change occurs in the legal situation, they lapse. Results obtained from the debates associated with the above-specified viewpoints cannot be perceived as conclusive arguments with regards to the theoretical discussion of the death penalty also because they only take into consideration marginal aspects thereof instead of the crucial questions that should be raised. Accordingly, this paper primarily deals with these crucial questions, namely, the topic of the alleged deterrent effect of capital punishment and the possibility of wrongful convictions,¹³ concentrating, principally but not exclusively, on the Hungarian scene.

First of all, as to the contingent deterrent effect of the penalty of death, lots of law scholars, criminologists, economists and, as a part of this latter, statisticians attempted to find whether there is (in deed) a deterrent effect of the death penalty or not. These attempts are of two sorts. The first kind of examination is based on *a priori* logic, supplemented by the concern of the pure number of murders and executions and the change thereof. The second kind are based on precisely prepared and conducted multifactor econometric surveys. In the first part of this paper I am going to examine the former based on the example of Hungary.

As for the *a priori* logic, there are two points of view competing with each other. The so-called retentionists or revivalists, namely, the advocates of capital punishment, deem that the more severe a penalty is (imposed on a perpetrator), the greater the fear of the consequences of a crime will be. They argue like this: "I do not want to be fined 100 dollars. I even less want to be fined 1000 dollars, even less punished with one year prison, even less with prison for life and least of all to be sentenced to death".¹⁴ In contrast to this, the abolitionists, that is, the opponents

¹³ Considering that a meaningful conclusion may only be drawn from the analysis of these issues if the alleged deterrent effect of the death penalty and the irreparable consequences of wrongful convictions are placed within the context of a criminal punishment that may serve as a potential and suitable alternative to capital punishment, at the end of my study I shall briefly discuss the situation of life imprisonment in Hungary, especially that of real life sentence.

¹⁴ For instance, according to Alexander Deak, capital punishment has a greater deterrent effect than life imprisonment, since it is final and irrevocable and there is no possibility of escape. Life imprisonment holds some hope (although very small) for freedom, either by means of escaping from prison or hoping for pardon from the President. Deak does believe that the threat of irrevocable death is in fact more dreadful than "normal" life imprisonment that does not last forever

of capital punishment, take the different types of murder and try to prove that in the cases of most of these the nature of the punishment does not affect the motivation of potential perpetrators.¹⁵ For example, it does not impact on crimes of passion.¹⁶ These criminals, according to the abolitionists, do not deliberate in

(only twenty or thirty years) or actual life imprisonment, which *might* not last a lifetime (due to the possibility of escape from prison or pardon). As he puts it: “I believe the view that a real criminal would not be deterred by capital punishment is not correct. On this basis, the entire Criminal Code should be repealed, as a notorious thief or fraud would not be deterred by punishment” (cf., A. Deak, ‘On capital punishment’ [A halálbüntetésről], *Belügyi Szemle* (1995/1), 55–57). Furthermore: “In my opinion a person who virtually excludes himself from society by committing a murder deserves the death penalty. ... Regardless of any contrary statement, I firmly believe that capital punishment has a deterrent — i.e. preventive — effect...” (*Ibid.*, pp. 55–56). György Pálkás, late Justice of the Supreme Court of Hungary, had a similar opinion; according to him, if even the death penalty had no deterrent effect, then no other punishment would have it. If even the most severe punishment cannot deter a person from committing a crime, then no other, more moderate penalties can. Should this be the case, we could abolish all punishments and renounce to the special and general preventive purpose of the criminal justice sanctions, as well (cf., G. Pálkás, ‘Requiem for a legal institution’ [Requiem egy jogintézményért], *Belügyi Szemle* (2001/6), 63–73). The doyen of the bar, Hungary’s best known defence counsel, György Bárándy, also regularly makes statements regarding the need to reinstate the death penalty; in addition, professor József Földvári, the criminal lawyer who gave his expert opinion to the Constitutional Court of Hungary in 1990 in the case of the abolition of capital punishment (CC Decision No. 23/1990), also formulated — on several occasions during the years before his death (2009), first in 2002, that if he was asked today to give an expert opinion in a similar case, he would not be in favour of abolishing the death penalty, because its application, according to him, is necessary in case of serious crimes.

¹⁵ Considering that the majority of the Hungarian criminal lawyers and criminologists are abolitionist, I will not provide a list of them and references to their works on the subject herein. The interested readers may nonetheless find the list of these works — published in Hungarian — in the bibliography of the following monograph: Z.J. Toth, *Capital Punishment: Pros and Cons* [Halálbüntetés pró és kontra] (Budapest: HVG-ORAC, 2012) (ISBN 978-963-258-177-4).

¹⁶ However, according to the so-called “economic paradigm” people are rational animals who weigh the potential advantages and disadvantages of all their activities, including legal and illegal actions, with each other. The (potential) criminals are also rational people responding to incentives when they consider whether to partake in illegitimate activities or a particular type of illegal act or to earn money doing righteous work. According to this theory, people choose not to commit crimes if the incentives motivating decent thriving or discouraging criminal lifestyle outweigh the stimulations to participate in unauthorised activities. These incentives, according to the most famous representative of the “economic paradigm”, Isaac Ehrlich, driving to or away from criminality can be the scope of legal and illegal earning possibilities in the neighbourhood of the possible criminals’ residence, the expected net gain from either the legal or the illegal activities available and, in the end, the “price” of the criminal behaviour. (cf., I. Ehrlich, ‘The deterrent effect of criminal law enforcement’, 1 *Journal of Legal Studies* (1972), 259–276; and I. Ehrlich, ‘The deterrent effect of capital punishment: a question of life and death’, 65 *American Economic Review* (1975), 397–417). This “price” consists of, on the one hand, the contingent magnitude of the penalty to be imposed on the offender caught and, on the other hand, the probability of the apprehension and conviction of the perpetrator. The more plausible a criminal will be apprehended and convicted and the more severe the punishment that is to be inflicted upon culprits, the less crime is expected to be committed. In addition, at least in

advance the possible consequences of their act; hence, they cannot be frightened by the penalty of death.¹⁷ This is also true for those who commit their crimes when being drunk or who are motivated by an overpowering, usually sexual, instinct (a so-called “drive”).¹⁸ Furthermore, it cannot deter those either who themselves want to die, for example, political perpetrators (anarchists, terrorists); “indirect suiciders” who want to die but are too coward to do this by their own hands and want to get into such a situation where the police officers have no other choice but to shoot them dead or where the authorities have the possibility to sentence them to death and execute them;¹⁹ or suicidal murderers who, actuated by jealousy, murder, for example, their wives and/or their wives’ lovers, and, not wanting to live further, commit suicide after the murder. In the end, the threat of death does not deter those who deem the police will not catch them. As Beccaria wrote some

Ehrlich’s opinion, and in contrast to the view mentioned above, this is also true for hate and passion crimes (see Ehrlich, ‘The deterrent effect of criminal law enforcement’, *op. cit.*, p. 274; and I. Ehrlich, ‘On positive methodology, ethics, and polemics in deterrence research’, 22 *British Journal of Criminology* (1982), 124–139). At the same time, John Cochran, Mitchell Chamlin and Mark Seth in their common paper (J.K. Cochran, M.B. Chamlin and M. Seth, ‘Deterrence or brutalization? an impact assessment of Oklahoma’s return to capital punishment’, 32 *Criminology* (1994), 107–134) denied Ehrlich’s statement, and, what is more, they claimed that these kind of offenses have a so-called “brutalization effect”, that is, the awareness of executions creates an atmosphere in which possible culprits tend to devalue human life and, consequently, in this atmosphere, more murders happen than it would if executions were not carried out at all (for the conclusions, see in detail: Cochran *et al.*, *op. cit.*, pp. 107, 121–124 and 128–130. For the original conception of the brutalization effect, see W.J. Bowers and G.L. Pierce, ‘Deterrence or brutalization: what is the effect of executions?’, 26 *Crime and Delinquency* (1980), 453–484).

¹⁷ And, of course, they cannot be frightened by any other penalty, either.

¹⁸ However, even when it comes to crimes committed under the influence of alcohol or crimes of passion, there is at least a moderate amount of deliberation behind one’s actions. This deliberation may manifest itself in the development of a typical attitude (in other words, in a general state of mind) towards violence, while the lack of these incentives may contribute to the development of a personality that does not reject destructive behaviour and is more prone to turn to violent methods in order to solve a matter; but it can also present itself in that short time span when the sudden resolve triggered by emotions is realized in the outside world since all affective acts are preceded by a momentary consideration during which every possible scenario is evaluated that might assist the enactment of the action or prevent it. If it was not so, that is, if a perpetrator had absolutely no control over his impulses and his sexual or any other instincts, in that case the perpetrator could not be a subject for punishment at all due to a lack of imputation and culpability (cf., Ehrlich, ‘The deterrent effect of criminal law enforcement’, *op. cit.*, p. 274; Ehrlich, ‘On positive methodology, ethics, and polemics in deterrence research’, *op. cit.*, p. 128; J.M. Shepherd, ‘Murders of passion, execution delays, and the deterrence of capital punishment’, 33 *Journal of Legal Studies* (2004), 283–322).

¹⁹ Pamela Watkins, a very rare example, was such an offender. For the case of Watkins, see A.G. Amsterdam, Anthony, ‘Capital punishment’, in Bedau, *The Death Penalty in America*, pp. 346–358. In Hungary, the famous offender of the bank robbery of Szena square committed the crime with this kind of motivation as well, and, as contrasted to Watkins, actually succeeded in his plan.

two and a half centuries ago: “Crimes are more effectually prevented by the certainty than the severity of punishment”.²⁰ (in addition: “It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance. The more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be”).²¹ Thus, the death penalty cannot exactly frighten the cruellest and most brutal offenders, for example, assassins, murderers for hire and so on, so those who think they are cleverer than the police officers and will not be apprehended. Hence, as per the abolitionists, the solution is not making the possible penalties more severe but making the investigations more effective.

By the way, both the abolitionists and the retentionists wish to prove the correctness of their standpoints on the ground of pure statistical analyses. The fault of these attempts (from both sides) is that they do not take into account that a plenty of other social trends and flows, numerous economic impacts and so on influence the criminality in a given state. Let me present only one example, my mother country, Hungary. In Hungary, the Constitutional Court declared capital punishment unconstitutional right after the end of the transition to democracy, in October 1990, by Constitutional Court Decision No. 23/1990 (31 October). Hence, the last year that we can consider a year with capital punishment is 1990 and the first year we can regard as a year without capital punishment is 1991. The mere statistical data are that, between 1975 and 1990, from a minimum of 185 to a maximum of 237²² murders, both premeditated²³ and not premeditated,²⁴ and murders of passion (or, as it is named officially in the Hungarian penal law, voluntary manslaughters committed with provocation or in the heat of passion) occurred every single year²⁵ (in these occurrences manslaughters as negligent crimes are not involved). This means that the number of murders in Hungary was almost the same in each year between 1975 and 1990, approximately 210 on average, with a margin of plus or minus 10%. In 1991, the first death-penalty-free year, this number

²⁰ C. Beccaria, *An Essay On Crimes and Punishments* [1764], e-book. (Indianapolis, IN: Liberty Fund, 2011), p. 49, available online at: http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf.

²¹ Beccaria, *op. cit.*, p. 51.

²² For the Hungarian statistical data, cf., Hungarian Statistical Yearbooks, 1975–2011.

²³ Intentional killing with malicious aforethought.

²⁴ Homicides.

²⁵ In detail: in 1975: 206; in 1976: 237; in 1977: 219; in 1978: 185; in 1979: 230; in 1980: 200; in 1981: 214; in 1982: 190; in 1983: 215; in 1984: 205; in 1985: 191; in 1986: 233; in 1987: 203; in 1988: 206; in 1989: 191; in 1990: 201 murders and involuntary manslaughters took place per year. Nevertheless, the number of the latter is not worth taking into account, since those criminal acts that are qualified as “involuntary manslaughters” occur very rarely, usually once or twice (or not once at all) per year.

rose to 307; in 1992, this number was exactly the same (307), and then, between 1993 and 1998, it fluctuated between 271 and 313.²⁶ Thus, it can be seen that the frequency of violent intentional killings was 1.5-times higher in the years after the abolition of capital punishment than in the years before that.

Based on these figures, retentionists could draw the conclusion that the abolition of the death penalty made the potential murderers more unflinching, more desperate and more fearless, but, in fact, this inference may be false, or at least, to be more exact, it lacks soundness. Why? First, the abolition of capital punishment happened just in the time when Hungary underwent the transition from state socialism to democracy. This transition was accompanied by the *anomic state of society* in a Durkheimian sense. This means that sharp, drastic and rapid changes cause a value crisis among the members of a society (called *anomie*), manifesting in, among other things, more frequent deviancy (for example, increased number of suicides, alcoholism and crimes). Furthermore, in Hungary this transition went together with liquidation of state companies, thereby dismissing lots of employees, making them unemployed; there was growing poverty and international organised crime turned up, all of these being criminogenic factors. This explanation (the explanation of anomie) is also corroborated by not only the increasing murder rate during these years but an increase of the total number of crimes as well; between 1975 and 1988 the number of crimes increased from about 120 000 crimes up to 188 000 per year²⁷ (on average, approximately, with a margin of plus/minus 20%, 150 000). The political transformation began, in fact, in 1989; thus, the causes of the growing number of crimes started to operate in that year. This actually did manifest in the years of the political transformation, even in 1989 as well. Namely, in 1989, the total number of crimes was 225 000, in 1990 it was 341 000, in 1991 it was 440 000, and then, between 1992 and 1999, it ranged from 389 000 to 600 000.²⁸ This means that the total number of crimes rose in a few years' time by about three- or fourfold, while the number of murders increased by only 1.5-fold, that is, the anomic state explanation seems to be a plausible one. And there is one

²⁶ In 1993: 298; in 1994: 313; in 1995: 296; in 1996: 271; in 1997: 289; in 1998: 289 intentional homicides eventuated.

²⁷ Annually: in 1975: 120 889; in 1976: 129 424; in 1977: 123 623; in 1978: 126 907; in 1979: 125 267; in 1980: 130 470; in 1981: 134 914; in 1982: 139 795; in 1983: 151 505; in 1984: 157 036; in 1985: 165 816; in 1986: 182 867; in 1987: 188 397 and in 1988: 185 344 crimes occurred.

²⁸ In detail, the total number of crimes in 1989 was 225 393; in 1990: 341 061; in 1991: 440 370; in 1992: 447 222; in 1993: 400 935; in 1994: 389 451; in 1995: 502 036; in 1996: 466 050; in 1997: 514 403; in 1998: 600 621; and in 1999: 505 716. Nonetheless, it has to be mentioned that the salient value of the crime rate in 2008 is due to one and only offender, who defrauded nearly 80 000 people (committing, as a consequence of it, almost 80 000 crimes) pretending to be a parking attendant and, hence, to be entitled to get money from drivers in order for them to be able to park in places where the parking in fact was free of charge.

more argument that corroborates this scenario. Namely, after 1999, when the shocking effects of the political transformation began to fade away, the number of murders started to decrease tendentially. In 2005 the number decreased below 200 for the first time (in this year this number was only 164, and it has even for now been staying around 150 murders per year), and there have never been so few murders as in the last four years because in 2008, 2009, 2010 and 2011 the number of murders and murders of passion were only 147, 139, 133 and 142, respectively.²⁹ Meanwhile, the average number of crimes did not change in essence, being between 394 000 and 465 000 from 2000 until 2011.³⁰

Based on these figures abolitionists could draw the conclusion that the abrogation of the former death penalty does not have any influence at all either on total criminality or on the former death-eligible offences. However, this latter inference is unsound, too. Since we are simply not able to learn what would have happened if capital punishment had not been abolished (it is, theoretically, possible that if capital punishment had not been abolished, then the number of murders would have dropped even more than it actually did), we cannot infer from pure statistical figures either that this kind of penalty deterred or that it did not deter some part of the potential murderers.

In the end, as regards the issue of the empirically-based deterrent or non-deterrent effect of capital punishment, it is worth reviewing the figures on recidivism. In Hungary, of those convicted of homicides, the number of simple recidivists varied between 3 and 14 in the last few years (between 1997 and 2011).³¹ Each year between 1997 and 2011, there was a minimum of 4 and a maximum of 23 repeat offenders among those convicted for homicide.³² And, what is the most important in this aspect, the numbers of habitual recidivists fluctuated

²⁹ For the period between 1999 and 2011 these figures are: in 1999: 253; in 2000: 205; in 2001: 254; in 2002: 203; in 2003: 228; in 2004: 209; in 2005: 164; in 2006: 174; in 2007: 154; in 2008: 147; in 2009: 139; in 2010: 133; and in 2011: 142.

³⁰ Annually: in 2000: 450 673; in 2001: 465 694; in 2002: 420 782; in 2003: 413 343; in 2004: 418 883; in 2005: 436 522; in 2006: 425 941; in 2007: 426 914; in 2008: 408 407; in 2009: 394 034; in 2010: 447 186; and in 2011: 451 371.

³¹ According to point 14 of Section 137 of the Criminal Code of Hungary, “recidivist” means the perpetrator of a premeditated criminal act, if such person was previously sentenced to imprisonment without probation for a premeditated criminal act, or the execution of such imprisonment has been suspended in part, and three years have not yet passed since the last day of serving the term of imprisonment or the last day of the term of limitation until the perpetration of another criminal act.

³² Pursuant to point 16 of Section 137 of the Criminal Code of Hungary, “repeat offender” means a person who has been sentenced to imprisonment without probation as a recidivist prior to the perpetration of a premeditated criminal act, or the execution of such imprisonment has been suspended in part, and three years have not yet passed since the last day of serving the term of imprisonment or the last day of the term of limitation until the perpetration of another criminal act punishable by imprisonment.

between 1 and 8 per year amongst the homicide offenders.³³ According to the Hungarian Criminal Code, “habitual recidivists” are those recidivists who commit on both occasions the same crime or a crime similar in nature. As for homicide, the “same crime” committed again by the offender is, apparently, another homicide,³⁴ and a “crime similar in nature” is an offence by which the perpetrator causes death or serious injury to his/her victim(s) and/or by which he/she endangers a lot of people, in both the cases, intentionally.³⁵

As for the second approach, however, one might think it could, *in thesi*, be found out whether the threat of death has any influence on the future behaviour of would-be murderers, and, to achieve this goal, the motivation of these potential offenders could be investigated by a more sophisticated methodology using the tools of econometry. Unfortunately, it proved to be a hopeless attempt, since even among economists there is no agreement on whether the effect of the legal existence or practical application of the death penalty on potential capital offenders can be measured at all or, if it can be gauged, whether this supposed deterrent effect exists or not. It is certain that much depends on the choice not only of the sample periods or the regression method applied but of the contingent preconception as well. Consequently, so many researchers, so many results.³⁶

The truth is that, in fact, neither the existence nor the non-existence of the deterrent effect of capital punishment can be proven. We simply are not able to get to know whether there is anyone who planned to commit a murder but did not do that because he got frightened of the possible penalty of death, albeit in lack of the death penalty he would have committed this offence. Since he did not do that effectively, we can never be certain that the murder would have happened or not, simply because none of us is a fortune teller, oracle or prophet.

³³ Since the number of habitual recidivists is of a great significance in terms of the operation of deterrence, I recite the figures thereof annually. In 1997 three, in 1998 one, in 1999 four, in 2000 three, in 2001 four, in 2002 two, in 2003 five, in 2004 also five, in 2005 three, in 2006 five, in 2007 eight, in 2008 four, in 2009 two, in 2010 one, and, in the end, in 2011 also 1 offender were qualified as habitual recidivists (for other, non-Hungarian examples, cf., J.K. Marquis, ‘Truth and consequences: the penalty of death’, in: Bedau and Cassell, *Debating the Death Penalty*, pp. 117–151).

³⁴ Except, of course, for manslaughter as negligent crime.

³⁵ According to paragraph a of Subsection 5 of Section 167 of the Criminal Code of Hungary, within the meaning of habitual recidivism, the following shall be construed as crimes of similar nature: voluntary manslaughter committed with provocation or in the heat of passion; genocide; aggravated cases of kidnapping and violence against a superior or a law enforcement officer; aggravated cases of acts of terrorism, seizure of an aircraft, any means of railway, water or road transport or any means of freight transport and insurrection, if the act causing death is perpetrated intentionally.

³⁶ For the results of the contemporary econometric studies on the contingent deterrent effect of the death penalty see J.Z. Toth, ‘The deterrent effect of the death penalty — from an econometric point of view’, *De iurisprudencia et iure publico* (2012/1–2), 151–186, available online at: http://www.dieip.com/2012_6_1_szam.pdf.

The matter of judicial errors and, as a consequence thereof, wrongful convictions also prompt a heated discussion between the abolitionists and the retentionists. In relation to the legal possibility for courts to impose death sentences on capital offenders, the greatest danger is the judicial murder, that is, with a German technical term, the so-called *Justizmord*. In the USA, from 1973 until recently, 141 death row prisoners have been exonerated from their death cells on the grounds that actually it was not them but somebody else who committed those crimes of which they were accused and convicted.³⁷

There is no knowledge of innocent people executed in Hungary, with, certainly, the exception of the political show trials following the revolution of 1956; however, we do know of 2 persons who were sentenced to death before the political transition of 1989–1990 without them having committed the crimes of which they were accused, but their innocence was proven before the death sentence could have been carried out. Nevertheless, wrongful convictions occurred even after 1990, which proves that there is no such infallible criminal procedure law system where only appropriate and solid judgements are made. The most famous example of this is the so-called Mor bank robbery. Mor is a small town where a bank was robbed in May 2002 by several gunmen who murdered all 8 people that were on the premises. The suspects, Ede Kaiser and Laszlo Hajdu, were apprehended shortly thereafter, while a third alleged perpetrator was supposed to be still on the loose by the police. The court adjudged Kaiser guilty of aggravated murder as a co-actor and sentenced him to life without parole, whereas Hajdu was condemned to 15 years of prison as an accomplice. The appellate court later annulled Hajdu's sentence, ordered the court of first instance to retrial the case but, as a final decision, upheld Kaiser's punishment. Only when the real offenders had been arrested did it become apparent that they had nothing to do with the slaughter. Many a lawyer is confident that, if capital punishment had been in effect in Hungary at that time, Kaiser would have already been executed by the time the real perpetrators were apprehended. Obviously, Kaiser is only legally innocent in this case, as he made a living from robberies, but he did not commit the murder which he was charged with and convicted of.

When inspecting faulty judicial decisions it is important to take discrimination into consideration, as it is not a rare occurrence that the judge is also imbued with social prejudices and, as a result, makes a — sometimes wrong — decision on the basis of his own biases. This is a universal attitude of humankind rather than an American peculiarity, which led to wrongful convictions in Hungary as well and will always do as long as adjudication is made by humans. That is why it makes a huge difference whether there is a possibility for the infliction of irreversible

³⁷ See *DPIC Fact Sheet* (25 October 2012), p. 2, available online at: <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

sentences in a particular legal system or not. The case of Denes Pusoma is an excellent example showing that mistakes and errors can take place at any time. We are not talking about a capital punishment case here because Pusoma was not accused of murder and not even of homicide, but was charged with battery causing death. Nonetheless, the procedural errors in question could well occur in any homicide or murder case.

Pusoma was an extremely poor Roma (gipsy) man who earned a living by doing odd jobs. An elderly woman was killed in a small Hungarian village on the evening of 16 March 1994, and Pusoma was charged with this crime shortly thereafter. Pusoma did indeed visit the house at noon on that day where the witnesses saw him quarrel with the woman and leave upset afterwards. The mentally disabled brother of the victim's neighbour testified that at the time of the crime, that is, in the evening, he had seen Pusoma entering the house and reappearing later with his clothes covered in blood. The court-appointed forensic expert said that the testimony was realistic and probably true. Later in the investigation, another person in pre-trial detention, with whom he shared a cell and who wished to be put under house arrest (for this reason he promised the public prosecutor to find evidence for Pusoma's guilt if he was going to be granted his request), handed a letter to the authorities which, according to him, had been written by Pusoma and which he opened out of curiosity. The letter contained a confession in Pusoma's handwriting, as attested by an expert. The circumstances of the writing of the letter are still not known, but the intellectually handicapped person admitted to the crime.

There was an additional piece of evidence against his innocence: the scent sample supposedly originating from the crime scene (from the room of the victim) was identified to be the same as Pusoma's by two dogs on 5 different occasions, while a match with other persons' scents was deemed implausible. However, it was not documented, either in the pictures taken by the police or in the onsite investigation report, that the scent sample had truly come from the crime scene, the lady's bedroom. In other words, there was no proof that the scent sample (which undoubtedly was Pusoma's) had been taken in the bedroom and not in the kitchen where Pusoma had demonstrably and actually been. At the same time, the police had been disregarding any fact interfering with their theory all along the investigation, even though several witnesses stated that they had seen two strange men near the house of the victim at the presumed time of the crime.

In the end, after the judgement of the court of first instance had come into effect and Pusoma had already been serving his prison term against which he did not lodge an appeal (to be more precise, his incoherent request was not regarded as an appeal), by a stroke of luck (the real perpetrators were apprehended) it turned out that the crime had been committed by the two men who had been seen near the crime scene. Thus, in these proceedings a number of mistakes led to the conviction of an innocent person: mistakes made by the police; by the public

prosecutor, who did not instruct the police to conduct a more thorough investigation and to inspect other possible scenarios as well and who accepted the offer of a police informant, giving credits unconditionally to the evidence supplied by him; by the court which failed to give a careful consideration to the aforementioned errors and which based the credibility of the evidence only on one of the contradictory experts' opinions on the reliability of the mentally disabled eyewitness; and by the assigned counsel, who did not warn his defendant about the consequences of an overdue appeal. Moreover, although it was his ethical obligation as an attorney to do so, he did not even file an appeal in his own name.

Sadly, the story of Denes Pusoma did not end with a happy end: after it had been found out that he had been falsely imprisoned, his prison term was suspended and he was exonerated, but when he claimed for compensation from the state for immaterial damages, his case was dismissed because the Hungarian law requires the defendant to lodge an appeal against the first-instance sentence in order to be entitled for compensation. Not much later, Pusoma committed suicide.

The cases of Mor and Pusoma are only two random instances of wrongful convictions. However, numerous erroneous judicial decisions that were not heard of are highly likely to have happened besides the known ones, even in capital cases, and only a few of them will be discovered even in the future. Therefore, simply the fact that there is no knowledge of ill-founded death sentences and executions in Hungary or in any country does not necessarily mean that such incidents have not happened. Plenty of judicial murders (wrongful imposition of the death penalty) have not been — and most of them will never be — discovered because the re-examination of a case concluded with capital punishment is useless; the consequences of the sentence are irreversible as one cannot be revived, one's death cannot be redressed; and pointing out their own mistakes and drawing attention to them is not in the authorities' interest. Mostly, such errors were, and still at present are, discovered only if the perpetrator had been apprehended on account of another investigation and, among others, they confessed to that particular crime as well, of which somebody else was accused (as well as convicted) previously and mentioned circumstances in their statement only they could know. Otherwise, cases concluded with execution were not further inspected. Evidently, once the authorities have convicted somebody and executed them, they do not attempt to reveal a possible slip.³⁸ The situation has essentially remained the same up to this day: the closed but debatable cases are re-opened only for strong reasons — and usually only when the convict's relatives demand it. Hence, although most of the old cases of debatable nature could be cleared up, it is very

³⁸) That is why, for example, the Hungarian police deserve praise, for their work led to the re-opening of the case of the Mor bank robbery claiming the life of 8 people despite the alleged perpetrator having been convicted with binding force.

plausible that the vast majority of the past judicial murders will never come to light. That is, wrongful judicial decisions were, are and will always be made,³⁹ and the abolitionists are right in that the easiest and most risk-free way of avoiding judicial murders is to keep away from the application of capital punishment.⁴⁰

However, throughout almost the whole history of Hungary,⁴¹ until the adoption of CC Decision No. 23/1990 by the Hungarian Constitutional Court, despite any doubts, on the one hand, whether the application of this legal institution serves the goal of deterrence or, on the other hand, it might be imposed against innocent people, capital punishment was a regular sanction (*poena ordinaria*) for lots of felonies. Astonishingly, at least at first glance, the death penalty was applied most frequently not in the Middle Ages but in the 20th century. There have never been so many legal executions in Hungary than during World War One and Two; however, because of a lack of reliable statistical data the precise number of the executions is not known to date. There were also numerous death penalties imposed in the 1950s, mainly in the years of retaliation after the Revolution of 1956. Only in 1961 did the situation return to normal, when implementation of martial law stopped for good and all. In this year, the Parliament of the People's Republic of Hungary passed the Act V of 1961 on the Criminal Code that allowed the infliction of the death penalty for altogether 31 criminal offences (for 9 crimes against the state,⁴² 2 crimes against peace and humanity,⁴³ 12 military offences⁴⁴ and

³⁹ For other, non-Hungarian examples, see S.B. Bright, 'Why the United States will join the Rest of the World in abandoning capital punishment', in Bedau and Cassell, *Debating the Death Penalty*, pp. 152–182; as for, specifically, the possible lack of effective representation, see E. Kreitzberg, 'Death without justice', 35 *Santa Clara Law Review* (1994–1995), 485–518; I. Mickenberg, 'Drunk, sleeping, and incompetent lawyers: is it possible to keep innocent people off death row?', 29 *University of Dayton Law Review* (2003–2004), 319–327.

⁴⁰ It is of course possible that by introducing increased procedural guarantees (e.g., independent indictments from 2 or 3 public prosecutors should be necessary for a death warrant, or the judicial council should only be able to inflict the death penalty when they are unanimous in their decision), the number of ill-founded death sentences could be reduced in those legal systems in which this punishment is still in use, but the complete elimination of possible errors could still not be accomplished.

⁴¹ For this issue, see in detail J. Z. Toth, *The Universal and Hungarian History of the Institution of Capital Punishment* [A halálbüntetés intézményének egyetemes és magyarországi jogtörténete] (Budapest: Századvég, 2010) (ISBN 978-963-7340-80-2).

⁴² In parentheses are the section and subsection numbers of the Hungarian Criminal Code (Act V of 1961): Conspiracy (116, para. 3; 117, para. 3); riot (120, para. 2); malicious mischief (124, para. 2); sabotage (125, para. 2); assault (126, paras 1–2); high treason (129, para. 2); aid and comfort for the enemy (130, para. 1); espionage (131, para. 3); crimes against other socialist states (133, para. 1).

⁴³ Genocide (137, para. 1); cruelty in time of war (139, para. 2).

⁴⁴ Desertion (312, para. 2); desertion abroad (313, para. 2); refusal of military service (315, para. 1); mutiny (316, paras 3–4); disobedience of a military order from a commander (317, para. 3); violence

8 common offences⁴⁵), but in no case this sanction was qualified as compulsory; the judge had the possibility to impose an imprisonment sentence for 10–15 years each time or, after 1972, an imprisonment for life. The Criminal Code's Amendment, the Law Decree No. 28 of 1971, entered into force on 1 January, 1972, reduced the number of the crimes punishable by death to 26,⁴⁶ although a new capital felony, seizure of aircraft, was introduced as well. In 1978, a new Criminal Code, namely, Act IV of 1978, was enacted which is in force even today.⁴⁷ This law stipulated capital punishment also for 26 offences, one of which was a new one, act of terrorism, while it abolished the penalty of death for riot of prisoners.⁴⁸

Meanwhile, the number of the death sentences imposed persistently decreased (in the 1960s there were 129 death sentences, in the 1970s there were 47 and in the 1980s there were only 32). Of these, in the 1960s, 1970s and 1980s 50, 13 and 3 death sentences, respectively, were imposed under military jurisdiction and 79, 34 and

against a superior or a law enforcement officer (318, para. 4); disobedience of a guard order (326, para. 3); violation of rules for duty of alert (327, para. 3); commander's breach of duty in a combat situation (331, para. 1); evasion of combat obligation (332, para. 1); compromising combat readiness (334, para. 2); violence against a war emissary (338, para. 2).

⁴⁵ Riot of prisoners (186, para. 3); public endangerment (committed in respect of social property, causing "particularly considerable" damage or pecuniary injury) (190, para. 2); homicide (with aggravating circumstances) (253, para. 2); theft (291, para. 1), embezzlement (292, para. 1), fraud (293, para. 1) and misappropriation of funds (294, para. 1) committed, either as part of a criminal conspiracy or as a recidivist, in respect of social property causing "particularly considerable" damage (295, para. 3); and robbery (299, para. 1) committed also in respect of social property causing "particularly considerable" damage (299, para. 4).

⁴⁶ It abolished the threat of death for offences against property, that is, for theft, embezzlement, fraud, misappropriation of funds and robbery committed in respect of social property, item, for public endangerment.

⁴⁷ This paper was written at the end of 2012 and at the beginning of 2013. However, 1 July 2013 Hungary's new Criminal Code, Act C of 2012, will enter into force in which the present regulation will change in several points. Therefore, hereafter when I write about the present situation of the Hungarian penal law stipulations, it means the provisions being operative before this time.

⁴⁸ In the original text of the Act IV of 1978 the death-eligible crimes were as follows (in parentheses the section and subsection numbers thereof): conspiracy (139, para. 3); riot (140, para. 4); malicious mischief (141, para. 3); sabotage (142, para. 2); assault (143, para. 2); high treason (144, para. 2); aid and comfort for the enemy (146, para. 1); espionage (147, para. 2); crimes against other socialist states (151, para. 1); genocide (155, para. 1); violence against the civilian population (158, para. 2); commission of war crimes (160, para. 1); violence against a war emissary (163, para. 2); desertion (343, para. 4); evasion of military service (346, para. 1); refusal of military service (347, para.); breach of discipline in the line of duty (348. (3)); mutiny (352, para. (3)); disobedience (354, para. 3); violence against a superior or a law enforcement officer (355, para. 5); compromising combat readiness (363, para. 2); commander's breach of duty in a combat situation (364, para. 1); evasion of combat obligation (365, para. 1); homicide (with aggravating circumstances) (166, para. 2); act of terrorism (causing death) (261, para. 2); seizure of aircraft (causing death) (262, para. 2).

29 under civil jurisdiction.⁴⁹ This means that the average number of the death sentences related to common offenses was 7.9 in the 1960s, 3.4 in the 1970s and 3.1 in the 1980s.^{50,51} However, the process of the abolition actually started only in 1983 when a conference was organized by the Hungarian Lawyers Alliance to discuss the future of capital punishment in the Hungarian criminal law. Nevertheless, the Hungarian abolitionist movement gained strength in deed when the League Against Capital Punishment was formed in 1989. Yet in 1989, the Parliament abolished capital punishment for political crimes, that is, all crimes against the state by Act XVI of 1989.⁵² In the subsequent year the League sought a ruling from the newly established Hungarian Constitutional Court to declare the death penalty unconstitutional on the ground that it was contrary to the right to life protected by Section 54 of the Hungarian Constitution, stating in addition, that this sanction is irreparable and irreversible, could not be justified ethically, and unsuitable in preventing or deterring the commission of serious crimes. Eventually, this happened in 1990 by the Constitutional Court Decision No. 23/1990. From there on the practice of capital punishment has been irrevocably forbidden in Hungary.⁵³

It is interesting that, in 1990, capital punishment was abolished in Hungary not for the same reasons as in other countries, namely not because its deterrent effect is not proven or not because it is to be feared that, owing to wrongful convictions, innocent people are sentenced to death and executed. Actually, these pragmatic aspects did not play a role in its abolition; instead, the statutory rules that regulated this legal institution were annulled by the Hungarian Constitutional Court solely for reasons of moral requirements and the constitutional constraints resting on them. For instance, in the United States the Supreme Court's *Furman*

⁴⁹ In detail: under civil jurisdiction, between 1960 and 1969 this number was annually 6, 14, 10, 5, 7, 9, 10, 9, 5 and 4; between 1970 and 1979 it was annually 6, 3, 6, 7, 4, 3, 1, 1, 1 and 2; between 1980 and 1989 it was annually 5, 3, 5, 3, 1, 2, 1, 5, 3 and 1; under military jurisdiction, between 1960 and 1969 this number was annually 13, 4, 2, 0, 0, 2, 10, 6, 6 and 7; between 1970 and 1979 it was annually 5, 2, 0, 1, 3, 0, 1, 0, 0, and 1; in the end, between 1980 and 1989 it was annually 0, 0, 1, 1, 1, 0, 0, 0 and 0 (cf., T. Horvath (ed.), *The Abolition of Capital Punishment in Hungary. A Documentary Compilation* [A halálbüntetés megszüntetése Magyarországon. Dokumentumgyűjtemény] (Miskolc: The League Against Capital Punishment, 1991), pp. 65–66; A. Firon, *Cain Stamp. Shall we pension off the executioner for good?* [Káinbélyeg. Nyugdíjazzuk-e végleg a hóhért?] (Budapest: Panorama, 1991), p. 101).

⁵⁰ Cf., Horvath, *op. cit.*, p. 45.

⁵¹ Interestingly, during this period of time, the frequency of the executions themselves did not decrease the same way. Namely, while in the 1970s the average number of executions was 2.4 per year, this number was 2.6 per year in the 1980s (in detail: between 1970 and 1989, the number of the executions actually carried out was 2, 5, 4, 2, 5, 2, 1, 1, 2, 4, 4, 3, 4, 2, 2, 0, 5, 2, 0 and 0). (cf., Firon, *op. cit.*, p. 101.)

⁵² This law was promulgated and came into effect on 15 June, 1989.

⁵³ The last execution in Hungary was carried out on 14 July 1988 when the multiple murderer Erno Vadasz was hanged. Nonetheless, the last death sentences were imposed in 1989, but they would never be carried out.

decision passed on 29 June 1972⁵⁴ held on a 5 to 4 vote⁵⁵ that the imposition and carrying out of capital punishment, as then practised, was unconstitutional because on the one hand it breached the Eighth Amendment's ban on cruel and unusual punishment, since the infliction of the death penalty was "arbitrary and capricious", and, on the other hand, it violated the Fourteenth Amendment's equal protection clause as well. In fact, these arguments were virtually not, or not only, legal but rather practical ones.⁵⁶

In contrast, the Constitutional Court of Hungary declared capital punishment unconstitutional by the CC Decision No. 23/1990 (31 October), since it deemed that every person has an inalienable right to life and human dignity of which nobody shall be deprived. The Subsection (1) of Section 54 of the previous Constitution of the Republic of Hungary (Act XX of 1949 revised and restated by Act XXXI of 1989) says that "[i]n the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily deprived of these rights". According to the Constitutional Court's argumentation, the Section 8 of the Constitution of Hungary states that "[t]he Republic of Hungary recognizes the inviolable and inalienable fundamental human rights. Ensuring the respect and protection of these shall be a primary obligation of the State". In addition: "[t]he right to life and human dignity are considered fundamental rights, whose exercise may not be suspended or limited even in a state of emergency, exigency or peril". Conversely, the literal meaning of Subsection 1 of Section 54 allowed for state organs to take somebody's life if this killing cannot be regarded as "arbitrary".

⁵⁴ *Furman v. Georgia* (408 U.S. 238). This case consists of virtually three different cases (*Furman v. Georgia*, *Jackson v. Georgia*, and *Branch v. Texas*) known jointly as *Furman v. Georgia* (see in detail, H.A. Bedau (ed.), Most death penalties are unconstitutional: *Furman v. Georgia* (1972), in *The Death Penalty in America*, pp. 253–270).

⁵⁵ The nine Justices can be divided into three categories: retentionists, abolitionists and neutrals. The retentionists or revivalists voted for the maintenance of capital punishment. These Justices are also called "constructionists" because they are committed to the exclusive legislative power of the Congress. There were four of them (Harry Blackmun, Warren Burger, Lewis Powell and William Rehnquist), that deemed that once the legislator ruled something, the Supreme Court do not have the right to change this will. Two Justices (William Brennan and Thurgood Marshall) were abolitionists and three (William Douglas, Potter Stewart and Byron White) were neutral and these five men's votes against the death penalty resulted in the temporary ban on executions.

⁵⁶ Nevertheless, this Supreme Court decision did not prevent state courts from imposing capital punishment on those found guilty of capital offenses, and what is more, state legislatures began creating new laws that complied with the requirements of the *Furman* decision. In 1976, a new era started when in *Gregg v. Georgia* (*Gregg v. Georgia* 428 U.S. 153 (1976)) the Supreme Court ruled that those death penalty statutes which gave the jury a discretionary power to decide whether a guilty defendant had to be sentenced to death or not (the so-called "guided discretion death penalty statutes") could be constitutional. This decision restored the constitutionality and, thus, the applicability of the death penalty in the United States (see in detail, H.A. Bedau (ed.), *The death penalty is not per se unconstitutional: Gregg v. Georgia* (1976), in *The Death Penalty in America*, pp. 271–288).

The Court eventually ruled that the collision between Sections 8 and 54 can be resolved in such a way that these provisions are interpreted as not to allow capital punishment, but guarantee (not for the state, but for individuals) the possibility for proportional justified defense.⁵⁷ The Court's reason for regarding capital punishment as unconstitutional was unique and peerless in the history of constitutional law. As per the Court, "[h]uman life and human dignity form an inseparable unity and have a greater value than anything else. Accordingly the rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the precondition for several other fundamental rights. [...] The right to human life and dignity as an absolute value create a limitation upon the criminal power of the State."⁵⁸ This decision was adopted on an 8-1 vote, that is, almost unanimously.⁵⁹

⁵⁷ According to Section 29 of Act IV of 1978 on the Criminal Code of Hungary, "[n]o punishment shall be imposed upon a person for any action that is necessary to prevent an unlawful attack against his person or his property or against the person or property of others, against the public interest, or an unlawful attack posing a direct threat in respect of the above." This provision can be regarded as constitutional even if an offender's potential victim causes lethal injuries to his/her attacker provided the unlawful conduct endangered the victim's life.

⁵⁸ Although with this decision and its reasoning the Constitutional Court, in considering the constitutionality of the death penalty, avoided having to adopt an opinion in the legal-political debates, its decision, however, is questionable from other aspects. The inseparability thesis stems from the monistic concept of man, that is, the unity of body and soul (as, according to the Constitutional Court, there is no life without dignity and there is no dignity without life) which (the monistic concept of man) is contrary to the principle of ideological neutrality of the State. The dualistic concept of man (life is expendable in order to preserving dignity) — as opposed to the monistic approach — would be in accordance with the ideological neutrality of the State because the dualistic constitutional approach does not exclude for each individual to live their lives according to the monistic concept of man as a guiding principle, however, the monistic constitutional approach excludes the individual decision to live life according to the dualistic approach (for gains and problems of the so-called "inseparability thesis of the right to life and human dignity", see e.g.: R. Uitz, 'Lessons from the Abolition of Capital Punishment in Hungary: A Fortuitous Constellation Amidst and Beyond Democratic Transition', 45 *Acta Juridica Hungarica* (2004), 67–99). The problem with the reasoning of the CC Decision No. 23/1990 is that it is consciously based on questionable moral ethics (which problems were also revealed in the reasoning of the CC Decision No. 22/2003 on euthanasia), albeit it would have been an obvious solution for the Constitutional Court to declare the death penalty unconstitutional on the basis of that it was in breach of Subsection 2 of Section 54 of the Constitution, which provision states that "[n]o one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment". Considering that the death penalty is undoubtedly a cruel and degrading punishment, a reasoning based on this would have been more sound and less debatable (for a criticism of the Constitutional Court's monistic concept of man, see J.Z. Toth, 'The past and future of the Inseparability Thesis in the light of the old Constitution and the new Fundamental Law' [Az oszthatatlansági doktrína múltja a régi Alkotmány, és jövője az új Alaptörvény fényében], in T. Drinóczi and A. Jakab (eds), *Constitutionalisation in Hungary* [Alkotmányozás Magyarországon]. Vol. 1 (Budapest: Pázmány Press, 2013), pp. 275–304).

⁵⁹ The one and only dissenting opinion was that of Justice Peter Schmidt. Nevertheless, even he agreed with the uselessness and inhumanity of the death penalty, but deemed that the Constitutional

Although capital punishment has been abrogated, there is a possibility in the Hungarian law for a cruel and grave offender not to endanger again the decent members of society since criminal courts can impose life sentences without the possibility of parole on those committing certain severe crimes, causing death to their victims. Life imprisonment (either without parole, or with the possibility of reviewing after a certain time whether the criminal would already be able to readapt into society) is indeed necessary since there are criminals who may still mean a threat to society decades after their incarceration. Therefore, it is desirable — strictly on a pragmatic and not moral basis — to have the legal possibility in a country to keep a criminal in prison until he no longer means a threat to society, however, without risking to apply an irreparable, irrecoverable sanction against an innocent person, due to a potential error of the judge. Consequently, life imprisonment may be considered a necessary and, simultaneously, sufficient legal consequence instead of capital punishment.

In the Hungarian penal law, life sentences are of two kinds. According to the Act IV of 1978 on the Criminal Code, imprisonment may be imposed for life or for a definitive period of time.⁶⁰ If the sentence is life imprisonment, then it either shall establish the earliest date of eligibility for parole with a minimum of 20 or 30 years,⁶¹ or shall preclude any eligibility for parole.^{62,63} The legal institution

Court has no power to dissolve a collision between contradictory constitutional rules, since it is the Parliament's exclusive right and obligation. As he wrote: "[w]hile the interpretation of the Constitution falls within the competence of the Constitutional Court, it is the right and obligation of the Parliament, the body empowered to frame or to change the Constitution, to resolve the conflict between the provisions of the Constitution. Such powers may not be assumed by the Constitutional Court. Therefore, in my opinion, the Constitutional Court should state that it lacks such a power, and should call the Parliament's attention to the necessity of eliminating the conflict. This would not exclude the possibility for the Constitutional Court to list all the current arguments against capital punishment".

⁶⁰ Subsection 1 of Section 40.

⁶¹ If the court has not precluded eligibility for parole, the earliest date of release on parole shall be, as a general rule, after serving a term of twenty years, or, exceptionally, at least a term of thirty years, if the life imprisonment was imposed for a criminal act that is punishable without any period of limitation. An interesting characteristic of this stipulation is that, in fact, the exception functions as the principal rule because there are more crimes in the Criminal Code that are punishable with life imprisonment and without any period of limitation (e.g., homicide with aggravating circumstances) than those punishable therewith but within a certain period of time (e.g., abuse of narcotic drugs).

⁶² Subsection 1 of Section 47/A.

⁶³ Eligibility for parole can be excluded by the court in connection with the following crimes: violent crimes committed by using actual force against a person or a thing, attempt to overturn constitutional order by force (Subsection 1 of Section 1390, aggravated cases of sabotage (Subsection 2 of Section 142), genocide (Subsection 1 of Section 155), apartheid (Subsections 1 and 3 of Section 157), aggravated cases of violence against the civilian population (Subsection 2 of Section 158),

of life without parole, however, was introduced into the Hungarian criminal law in 1993 by Act XVII of 1993 on the Amendment to the Criminal Code. This law came into effect on 15 May 1993, stipulating that a person sentenced to life imprisonment may not be released on parole if he is sentenced to another term of life imprisonment.⁶⁴ Nevertheless, this provision did not allow for courts to impose life without parole on those who had not been sentenced to life imprisonment until their convictions. The legislature opened the door for criminal courts to impose “actual life sentences” or “whole life tariffs” in deed when permitted the application of this kind of sanction even against those who committed certain serious crimes, typically homicides with aggravating circumstances,⁶⁵ on the first occasion. This occurred in 1998 by Act LXXXVII of 1998 which entered into force on 1 March 1999; from that date Hungarian criminal courts sentenced some two dozen offenders to life without parole. Albeit the Constitutional Court of Hungary had been reviewing the constitutionality of this legal institution,⁶⁶ in the end, it could not reach a decision in the case since, in the meantime, the Parliament, as a constituent authority, enacted Hungary’s new constitution, the Fundamental (“Basic”) Law of Hungary (as of 25 April 2011), that explicitly stipulates that sentences of life imprisonment without parole may be imposed for, and only for violent intentional crimes.⁶⁷ Therefore, so long as this constitutional provision is in effect the Constitutional Court will not be permitted to declare it unconstitutional.

commission of war crimes (Section 160), use of a weapon prohibited by international convention (Subsection 1 of Section 160/A), aggravated cases of violence against a war emissary (Subsection 2 of Section 163), aggravated cases of homicide (Subsection 2 of Section 166), aggravated cases of kidnapping (Subsections 3 and 4 of Section 175/A), aggravated cases of trafficking in human beings (Subsection 5 of Section 175/B), aggravated cases of public endangerment (Subsection 3 of Section 259), acts of terrorism (Subsection 1 of Section 261), aggravated cases of unlawful seizure of an aircraft, of any means of railway, water or road transport or of any means of freight transport (Subsection 2 of Section 262), aggravated cases of mutiny (Subsections 3 and 4 of Section 352), aggravated cases of violence against a superior or a law enforcement officer (Subsection 5 of Section 355), aggravated cases of compromising combat readiness (Subsection 2 of Section 363), commander’s breach of duty (Section 364) and evasion of combat obligation (Section 365).

⁶⁴ This provision was originally been placed under Subsection 4 of Section 47/A but now, according to other changes of the regulation of life imprisonment, it is in Subsection 2 of Section 47/C.

⁶⁵ In Hungarian criminal law, a homicide (actually, a “murder”) can be qualified as aggravated homicide (murder) if the homicide is committed: with premeditation; for financial advantage; or for another malicious motive or purpose; with extreme brutality; against a public official or a foreign public official during or because of his official proceedings, against a person performing public duties when carrying out such duties, or against a person providing assistance to or acting in defence of such persons performing official or public duties; on more than one person; endangering the life of a great many people; as a habitual recidivist; against a person under the age of fourteen; against a person incapable of self-defence.

⁶⁶ It examined whether the actual life sentence constitutes a violation of right to human dignity.

⁶⁷ Article IV (2).